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NO. 58200-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ENVER MESTROVAC,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES AND BOARD OF INDUSTRIAL INSURANCE APPEALS,

Appellant/Cross-Respondents.

SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Mestrovac's Reply Brief raises two new arguments. First, he argues, for the first time in this case at any level of review and without citation to supporting authority, that overtime premium pay (the time-and-a-half pay) is a form of "bonus" that must be included in wage computation under RCW 51.08.178(3). Mest. Reply Br. at 2-5. Second, he argues that a Supreme Court decision, *Granger v. Dep't of Labor & Indus.*, 159 Wn.2d 752, 153 P.3d 839 (2007), issued after the Department filed its final scheduled brief in this case, somehow had the effect of overruling this Court's decision in *Erakovic v. Department of Labor & Industries*, 132 Wn. App. 762, 134 P.3d 234 (2006), despite the fact that the Supreme Court *Granger* decision mirrors this Court's 2005 decision in the same case (*Dep't of Labor & Indus. v. Granger*, 130 Wn. App. 489, 123 P.3d 858 (2005)), to which Mestrovac did not even cite in his earlier briefing. Mest. Reply Br. at 6-15.

By separate motion filed with this brief, the Department of Labor and Industries has requested permission to file this Supplemental Brief.

II. THE COURT SHOULD REJECT MESTROVAC'S TWO NEW ARGUMENTS

A. This Court Should Reject As Waived and Without Merit Mestrovac's New Argument That Overtime Premium Pay Is A Form Of "Bonus"

Mestrovac raises a new argument that overtime premium pay is a form of "bonus" within the meaning of RCW 51.08.178(3). Mestrovac Reply Br. at 2-5. This argument should be rejected both because he waived it by failing to assert it before and because it lacks merit.

In his opening brief, Mestrovac appeared to raise only two specific challenges, one legal and one factual, to the Superior Court's factoring of his overtime earnings into its determination of his RCW 51.08.178 wage computation. Mest. Op. Br. at 43-44; DLI Resp. Br. at 38-42.

In his Reply Brief, Mestrovac does not offer any direct or meaningful response to the Department's attacks on the two overtime pay arguments he made in his opening brief.[1] Instead, for the first time in this case, he raises a new argument that overtime premium pay is a form of "bonus" and therefore that subsection (3) of RCW 51.08.178 supports his request for an increased wage computation. Mestrovac Reply Br. at 2-5.

Nowhere in any of his several hundred pages of briefing to the Board of Industrial Insurance Appeals and the Superior Court did Mestrovac ever raise this theory. Not only should he be deemed to have waived this argument by not raising it below (*see generally* the waiver cases cited in the Department's Response Brief at 40-41), his failure to raise it at this level until submitting his Reply Brief compels the rejection

[1] Indeed, it appears that he now implicitly concedes that he was wrong in his factual assertions in his opening argument. *See* Mest. Reply Br. at 4 n.3.

of his new argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (an argument generally cannot be raised for the first time in a Reply Brief).

In any event, there is no merit to Mestrovac's argument that overtime pay is a form of "bonus" payment within the meaning of RCW 51.08.178(3). He cites no on-point authority, and the Department can find none from any jurisdiction that would support his new, counterintuitive argument that overtime premium pay is a form of "bonus." For that reason alone, his argument should be rejected. *See generally* RAP 10.3(a)(6).

In addition, Mestrovac's interpretation of the word "bonus" in RCW 51.08.178(3) is inconsistent with its plain meaning. A statute clear on its face should be given its plain meaning in order to ascertain and carry out the intent of the Legislature. *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000). Plain meaning is discerned from all that the Legislature has said in the statute and related statutes. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

In the workers' compensation law context, the term "bonus" has a special or technical meaning as a form of employer remuneration for work. "Bonus means a special payment made by the employer to the employee in addition to the stipulated wages or salary, as a reward for the

employee's performance or as an incentive for the employee to remain with the employer." Gavin L. Phillips, Annotation, *Workers' Compensation: Bonus as factor in determining amount of compensation*, 84 ALR 4th 1055 n.1 (1991). When a term is used in a statute in a technical or special context, the technical or special meaning of the term is what determines plain meaning. *City of Spokane v. Dep't of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002).

The ordinary meaning of the word "bonus" is consistent with this technical definition. *See* Websters Third New International Dictionary (Unabridged) 252 ("bonus" in the employment compensation context is "money or an equivalent given in addition to the usual compensation (surplus profits distributed among the workers as a bonus) . . . the payment made by the employer under a bonus system" and "bonus system" or "bonus plan" is "wage payment whereby a worker is paid an additional amount for accomplishing more than a specified measure of work"); Ballentines Law Dictionary (3d ed.) 147 ("bonus" in the employment compensation context is "something paid an employee above stipulated wages," and "bonus plan" is "an established plan, followed by a corporation, for the remuneration of officers and employees, in addition to regular salaries or wages, as an incentive to additional effort and use of skill on behalf of the company").

Mestrovac's argument is also inconsistent with the definition of the word "bonus" in the federal wage and hour laws that parallel Washington's laws (RCW 49.46). *See Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000) ("When construing provisions of the Washington Minimum Wage Act, this Court may consider interpretations of comparable provisions of the Fair Labor Standards Act of 1938 as persuasive authority."). Under regulations implementing the Fair Labor Standards Act (FLSA –29 U.S.C. §§ 201-219), "bonus" means "a sum which is paid as an addition to total wages usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift." 29 C.F.R. § 778.502. Mestrovac's overtime pay does not qualify as a "bonus" under this definition.

Both the FLSA regulations and Washington's parallel law distinguish between (1) *discretionary* bonuses, which are not included in *regular* pay calculation – the basis for determining the amount of *overtime premium pay* due – and cannot lawfully be deemed to be overtime premium pay and (2) *non-discretionary* bonuses, which are included in *regular* pay calculation, and hence are not considered overtime premium pay. 29 C.F.R. §§ 778.211, 212; *see also* 48B Am. Jur. 2d, Labor & Labor Relations § 3138 (2005). Thus, under wage and hour laws, a bonus is not

overtime premium pay. Nor is overtime premium pay a bonus. Mestrovac's claim to the contrary lacks merit.

Further, treating overtime premium pay as a "bonus" under RCW 51.08.178(3) cannot be reconciled with and would render meaningless and of no effect the statutory phrase in RCW 51.08.178(1) that "wages . . . shall not include overtime pay". *See In re Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 627, 121 P.3d 1166 (2005) (the court must consider "the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question"); *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) ("Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous."). This Court should avoid such an absurd or strained reading of RCW 51.08.178(3). *See Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003) ("We avoid readings of statutes that result in unlikely, absurd, or strained consequences.").

In sum, Mestrovac's new "bonus" argument is waived and, in any event, lacks merit.

B. This Court Should Reject Mestrovac's New Argument That The Supreme Court's *Granger* Decision (Which Mirrored This Court's *Granger* Decision) Somehow Overruled This Court's *Erakovic* Decision

Mestrovac has argued throughout this case that an employer's taxes for unemployment benefits should be included in wage computation and that this Court should "reverse" its decision in *Erakovic*, where this Court held that employer taxes for Social Security, Medicare, and Industrial Insurance do not constitute "wages." Mest. Op. Br. at 45-46; Mest. Reply Br. at 6-15. As the Department has explained, this argument misstates this Court's rationale in *Erakovic* and that of the Supreme Court in *Cockle v. Department of Labor & Industries*, 142 Wn.2d 801, 821-23, 16 P.3d 583 (2001), and *Gallo v. Department of Labor & Industries*, 155 Wn.2d 470, 491-92, 120 P.3d 564 (2005). DLI Resp. Br. at 45-48.

Mestrovac devotes over half of his Reply Brief to now arguing that the Supreme Court's decision in *Granger v. Department of Labor & Industries*, 159 Wn.2d 752, 153 P.3d 839 (2007), decided on an unrelated wage computation issue after the Department had already submitted its response brief in this case, overruled this Court's decision in *Erakovic v. Department of Labor & Industries*, 132 Wn. App. 762, 134 P.3d 234 (2006). Mest. Reply Br. at 6-15. But he does not explain why he did not cite to *this Court's* 2005 decision in *Granger*, when the Supreme Court's later decision essentially mirrors this Court's analysis in *Granger*. More importantly, there is no merit to his claim of conflict between this Court's *Erakovic* decision and the Supreme Court's *Granger* decision.

Mestrovac's argument that the Supreme Court's *Granger* decision overruled this Court's *Erakovic* decision fails for at least three reasons. First, the *Granger* case did not implicate the employer-taxes-as-wages questions that Mestrovac raises in this case. *Cf. Granger*, 130 Wn. App. at 493-97 (this Court's analysis) and *Granger*, 159 Wn.2d at 757-66 (the Supreme Court's mirroring analysis) *with Erakovic*, 132 Wn. App. at 767-76. The only thing *Erakovic* and *Granger* have in common is that they both arise under RCW 51.08.178.

Second, the dispute in *Granger* concerned the specific language "receiving at the time of the injury" in RCW 51.08.178. *Granger*, 130 Wn. App. at 496 (this Court's analysis); *Granger*, 159 Wn.2d at 762 (the Supreme Court's mirroring analysis). *Granger* addressed the specific issue of what constitutes *the time of receipt* of health benefits under a banked-hours scheme; no one questioned there that the employer was providing the consideration at issue - - health benefits - - to the injured worker. *Granger*, 130 Wn. App. at 496; *Granger*, 159 Wn.2d at 759.

There was no suggestion by this Court or the Supreme Court or the parties in *Granger* of any support for Mestrovac's argument that taxes an employer pays to the government can be *consideration provided by the employer to the worker*. *Cf. Erakovic*, 132 Wn. App. at 768-70 (employer payment of taxes not consideration for work) *with Granger*, 159 Wn.2d at

757-63 (recognizing the undisputed proposition that health benefits are consideration for work), and *Granger*, 132 Wn. App. at 493-97 (same). Hence, there is no merit to Mestrovac's claim that the Supreme Court decision in *Granger* supports his theory that taxes are consideration to the worker.

Third, neither of the appellate Courts in *Granger* suggested making any change to the *Cockle-Gallo* temporal necessity standard for determining what constitutes "consideration of like nature" to board, housing and fuel. Indeed, *Erakovic's* application of the *Cockle-Gallo* standard is completely consistent with *Cockle*, *Gallo*, and with the two *Granger* decisions. *See Erakovic*, 132 Wn. App. at 770; *Granger*, 159 Wn.2d at 757-59; *Granger*, 130 Wn. App. at 493-97. In fact, this Court in *Erakovic* specifically recognized and cited to this Court's *Granger* decision for the proposition that the "receiving . . . at the time of injury" limitation requires only that the employer benefits be "funded by the employer at the time of the injury." *Erakovic*, 132 Wn. App. at 772, 772 n.31 (citing *Granger*, 130 Wn. App. at 495).

Mestrovac asserts that this Court in *Erakovic* "emphasized that the injured worker was not receiving Social Security or Medicare benefits 'at the time of her injury'". Mest. Reply Br. at 8. He is incorrect. This Court in *Erakovic* specifically stated that, under *Granger*, Ms. Erakovic met

RCW 51.08.178's test for "receiving at the time of the injury," while holding that the benefits at issue did not meet the "consideration of like nature" test:

> *Erakovic's benefits were being funded at the time of the injury* because her employer was making Social Security and Medicare payments at the time of the injury. But she fails to explain what the benefits of those programs are or why they are so critical to workers' health or survival that workers would be required to replace them during even temporary periods of disability.

Erakovic, 132 Wn. App. at 773 (emphasis added).

In sum, there is no merit to Mestrovac's new argument that the Supreme Court's *Granger* decision overrules *Erakovic*'s "consideration of like nature" analysis.

III. CONCLUSION

For the foregoing reasons, this Court should reject the new arguments raised in Mestrovac's Reply Brief.

RESPECTFULLY SUBMITTED this 19th day of June, 2007.

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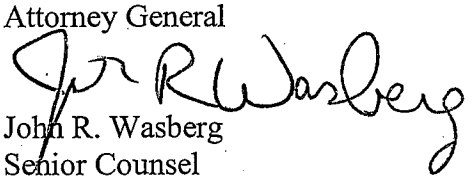

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